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No. 96-1462

Supreme Court, U.S.

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM 1996

CHRISTOPHER H. LUNDING, BARBARA J. LUNDING,

*Petitioners,*

—v.—

TAX APPEALS TRIBUNAL OF THE STATE OF NEW YORK,  
COMMISSIONER OF TAXATION AND FINANCE OF THE  
STATE OF NEW YORK,

*Respondents.*

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS  
OF THE STATE OF NEW YORK

**BRIEF FOR PETITIONERS**

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**QUESTION PRESENTED**

Did the court below err in holding that New York Tax Law Section 631(b)(6), which discriminates against nonresidents of New York who pay New York State income tax by expressly denying them entirely a tax deduction for alimony payments which New York residents are allowed fully to take, does not violate the Privileges and Immunities Clause (Article IV, Section 2) of the United States Constitution?

## PARTIES TO THE PROCEEDING

Respondents the Tax Appeals Tribunal of the State of New York and the Commissioner of Taxation and Finance of the State of New York were the Respondents-Appellants below. Petitioners Christopher H. Lunding and Barbara J. Lunding were the Petitioners-Appellees below. -

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**BRIEF FOR PETITIONERS**

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The Petitioners respectfully submit this, their Brief, to this  
Honorable Court.

**OPINIONS BELOW**

The opinion of the Court of Appeals of the State of New York below, dated December 18, 1996, is reported at 89 N.Y.2d 283, 675 N.E.2d 816, 653 N.Y.S.2d 62; App. 1a.<sup>1</sup> The opinion of the Appellate Division of the Supreme Court of the

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<sup>1</sup> "App." refers to the appendices included with the Petition for a Writ of Certiorari, filed March 17, 1997. By Order of this Court dated June 23, 1997, a Joint Appendix has been dispensed with.

State of New York—Third Department below, dated March 14, 1996, is reported at 218 A.D.2d 268, 639 N.Y.S.2d 519 (3d Dep't 1996); App. 11a. The Decision of the Tax Appeals Tribunal of the State of New York below, dated February 23, 1995, is reproduced at App. 16a. The Determination of the Administrative Law Judge of the State of New York—Division of Tax Appeals below, dated April 28, 1994, is reproduced at App. 25a.

### JURISDICTION

The judgment of the Court of Appeals of the State of New York was entered on December 18, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a). The Petition for Writ of Certiorari was filed on March 17, 1997, and thus was timely under 28 U.S.C. § 2101(c). The Order granting the Writ of Certiorari was issued on May 19, 1997; and this Brief is filed within 45 days of that date.

### CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

This case invokes the Privileges and Immunities Clause, U.S. Const. Article IV, Section 2, which provides that "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

The statute which Petitioners seek to have declared unconstitutional is Section 631(b)(6) of the New York Tax Law, which provides that "The deduction allowed by section two hundred fifteen of the internal revenue code, relating to alimony, shall not constitute a deduction derived from New York sources."

### STATEMENT OF THE CASE

Petitioners seek reversal of the judgment below of the Court of Appeals of the State of New York, which held that Section 631(b)(6) of the New York Tax Law ("Section 631(b)(6)") is not unconstitutional under the Privileges and Immunities Clause of the United States Constitution.

The procedural history of the case is summarized correctly in the opinion below of the Court of Appeals of the State of New York. Challenges to Section 631(b)(6) on federal constitutional grounds explicitly were raised by Petitioners at all administrative review levels of the proceedings below, as well as in all proceedings in the courts below. *See Lunding v. Tax Appeals Tribunal*, 89 N.Y.2d 283, 285-86, 675 N.E.2d 816, 817-18, 653 N.Y.S.2d 62, 63-64 (1996) ("Lunding II"), App. 2a; *Lunding v. Tax Appeals Tribunal*, 218 A.D.2d 268, 269-270, 639 N.Y.S.2d 519, 519-20 (3d Dep't 1996) ("Lunding I"), App. 12a; Determination of Administrative Law Judge in *In re Lunding*, DTA No. 810921 (Apr. 28, 1994) ("ALJ Determination") at 1, App. 26a. Indeed, it has been stipulated that if Section 631(b)(6) is constitutional, the Petitioners owe additional New York State personal income tax and if it is not, they do not. ALJ Determination at 3, Paragraph 6, App. 27a.

The relevant facts are quite simple, and are set out in the administrative determinations and court opinions below. In 1990, Petitioner Christopher H. Lunding was a partner in a New York City law firm and derived substantial income in New York from his law practice there. Petitioners were residents in that year of the State of Connecticut and timely filed a joint nonresident New York State personal income tax return. In 1990, Mr. Lunding paid \$108,000 of alimony to a former spouse; and Petitioners took a deduction on their 1990 New York nonresident personal income tax return for \$51,934, or 48.0868% of that alimony. This percentage represented the percentage of Petitioners' total 1990 personal income earned in New York. Petitioners' deduction for

alimony paid was denied solely on the basis of Section 631(b)(6), which provides that "[t]he deduction allowed by section two hundred fifteen of the internal revenue code, relating to alimony, shall not constitute a deduction derived from New York sources." *Lunding II*, 89 N.Y.2d at 286, 675 N.E.2d at 818, 653 N.Y.S.2d at 64, App. 2a; ALJ Determination at 2-4, App. 26a-27a.

Because of the denial of this alimony deduction, Petitioners' personal income for New York purposes was increased by a like amount (\$51,934), resulting in the issuance to Petitioners of an assessment for additional 1990 New York State personal income tax in the amount of \$3,724, plus interest. *See Lunding II*, 89 N.Y.2d at 285, 675 N.E.2d at 818, 653 N.Y.S.2d at 64, App. 2a; ALJ Determination at 3, Paragraph 5, App. 27a. This assessment raised the total 1990 New York State personal income tax determined to be payable by Petitioners from \$25,118 to \$28,842, thus increasing Petitioners' 1990 New York State personal income tax liability by 14.8%. ALJ Determination at 4, App. 29a. It is not disputed that residents of New York State are allowed to deduct the entire amount of alimony paid in a given year in determining their taxable income for New York State personal income tax purposes. *Lunding I*, 218 A.D.2d at 270, 639 N.Y.S.2d at 520, App. 13a.

In order to appreciate fully the genesis and context of the matters raised here, it is necessary to understand the events which led to the passage of Section 631(b)(6), which was added to the New York Laws in 1987. It is indisputable that there is not one word of legislative history for this statute, *Lunding I*, 218 A.D.2d at 271, 639 N.Y.2d at 521, App. 14a. Indeed, until Petitioners commenced these proceedings, the only intended purpose for Section 631(b)(6) ever advanced by any instrumentality of the State of New York was in an advisory opinion of the New York State Tax Commissioner in *In re Rosenblatt*, [1989-1990 Transfer Binder] N.Y. St. Tax Rep. (CCH) ¶ 252-998, at 17,968 (Jan. 18, 1990), in which it was

declared that Section 631(b)(6) was intended "specifically [to] revers[e] *Friedson [sic] v. State Tax Commission*, 64 N.Y. 76 (1984)."

The case referred to is *Friedsam v. State Tax Commission*, 98 A.D.2d 26, 470 N.Y.S.2d 848 (3d Dep't 1983), *aff'd*, 64 N.Y.2d 76, 473 N.E.2d 1181, 484 N.Y.S.2d 807 (1984). The facts there were strikingly similar to those in the case at hand. Mr. Friedsam was a Connecticut resident employed in New York and claimed alimony payments on his New York State personal income tax return in an amount proportionate to the relationship between his New York salary and his total income. Friedsam's deduction for alimony was disallowed by the New York tax authorities under then existing nonstatutory New York tax policies, and he sued to have that disallowance annulled and a judgment entered

"holding that because a [New York] resident is allowed alimony paid as an adjustment against income while a nonresident is not, the disparity in treatment without a substantial reason is violative of the privileges and immunities clause . . . ." 98 A.D.2d at 27, 470 N.Y.S.2d at 849.

In the *Friedsam* case, the Appellate Division of the Supreme Court of the State of New York—Third Department (the "Appellate Division") held that New York's disallowance of a deduction for alimony to nonresidents such as Mr. Friedsam violated the Privileges and Immunities Clause, noting that under the challenged New York tax policy

"it makes no difference where an alimony recipient lives, where the marriage and divorce took place, where the awarding divorce court was situated, or whether the recipient is taxed by New York. The only criterion is whether the payer [of alimony] is a resident or nonresident [of New York]. Without more, there results a con-

stitutional violation which we may not condone." 98 A.D.2d at 29, 470 N.Y.S.2d at 850.

On appeal, the New York Court of Appeals affirmed on statutory grounds alone, holding that the disallowance of Mr. Friedsam's proportionate deduction of alimony violated the "policy of substantial equality" established by the tax statutes of New York then in effect. 64 N.Y.2d at 81-82, 473 N.E.2d at 1184, 484 N.Y.S.2d at 810. Subsequently, Section 631(b)(6) was enacted to revoke this statutory "policy of substantial equality," which ultimately led to the proceedings here.

In the instant case, the Appellate Division followed its decision in *Friedsam* and unanimously held that Section 631(b)(6) is unconstitutional under the Privileges and Immunities Clause. *Lunding I*, 218 A.D.2d at 272, 639 N.Y.S.2d at 521, App. 15a. However, the New York Court of Appeals reversed and reinstated Section 631(b)(6), reasoning that this statute did not violate the Privileges and Immunities Clause, even though it imposed unequal taxation on nonresidents (which, indeed, evidently was its entire purpose and intended effect). The New York Court of Appeals rested this holding on two purported reasons. First, it stated that "[t]he disparate tax treatment of alimony paid by a nonresident is fully justified in light of the disparate treatment of income: nonresidents are taxed only on income earned in New York, while residents are taxed on all income earned from whatever sources." Second, it stated that "the disallowance [of a deduction to nonresidents for alimony paid] is substantially justified by the fact that petitioner's alimony payments are . . . wholly linked to personal activities outside the State [of New York]." 89 N.Y.2d at 290-91, 675 N.E.2d at 821, 653 N.Y.S.2d at 67, App. 8a. For the reasons set forth below, this reasoning is specious; and there is no precedential support for using such factors to turn away a challenge based on the Privileges and Immunities Clause to a State statute which plainly discriminates against nonresidents. Accordingly, Section 631(b)(6) should be declared unconstitutional.

## SUMMARY OF ARGUMENT

Under settled precedents of this Court, once it is established that a statute discriminates against nonresidents, that statute is unconstitutional under the Privileges and Immunities Clause unless a substantial reason sufficient to sustain it is shown to exist. Here, Section 631(b)(6) plainly discriminates against nonresidents; and no valid or rational reason sufficient to sustain its constitutionality exists. Thus, Section 631(b)(6) should be declared and adjudged to be unconstitutional as violative of the Privileges and Immunities Clause of the United States Constitution.

## ARGUMENT

### A. Under Settled Precedents Of This Court, A Statute Which Discriminates Against Nonresidents May Be Sustained Only If It Is Justified By Substantial Reasons

Discriminatory taxation of nonresidents has been held to be unconstitutional under the Privileges and Immunities Clause at least since 1870, when this Court decided *Ward v. Maryland*, 79 U.S. (12 Wall.) 418 (1870). There, the Court held that the Privileges and Immunities Clause, among other things,

"plainly and unmistakably secures and protects the right of a citizen of one State . . . to be exempt from any higher taxes or excises than are imposed by the State upon its own citizens." 79 U.S. at 430.

Amplifying upon these rights, the Court stated that

"it should not be forgotten that the people of the several States live under one common Constitution, which was ordered to establish justice, and which, with the laws of Congress . . . is the supreme law of the land; and that the supreme law requires equality of burden, and forbids

discrimination in State taxation when the power is applied to the citizens of other States." 79 U.S. at 431.

Indeed, writing almost eighty years later, Justice Frankfurter observed that

"it is fair to summarize the decisions [of this Court] which have applied Art. IV, § 2, by saying that they bar a State from penalizing the citizens of other States by subjecting them to heavier taxation merely because they are such citizens . . . ." *Toomer v. Witsell*, 334 U.S. 385, 408 (1948) (concurring opinion).

*Ward*, which struck down a discriminatory tax on nonresident merchants, was followed by *Travis v. Yale & Towne Manufacturing Co.*, 252 U.S. 60 (1920), which declared unconstitutional under the Privileges and Immunities Clause a New York statute that denied to nonresidents employed in New York a \$1,000 personal exemption from taxation of income which residents of New York enjoyed. In *Travis*, the Court noted that proper analysis should focus on "the concrete, the particular incidence" of the discriminatory tax and stated that the discrimination in issue there was

"not a case of occasional or accidental inequality due to circumstances personal to the taxpayer . . . ; but a general rule, operating to the disadvantage of all non-residents including those who are citizens of the neighboring States, and favoring all residents including those who are citizens of the taxing State"

and thus unconstitutional. *Travis*, 252 U.S. at 80-81 (citation omitted).

In more recent times, *Travis* was followed and cited with approval in *Austin v. New Hampshire*, 420 U.S. 656 (1975), a case which declared unconstitutional under the Privileges and Immunities Clause a New Hampshire statute which had the discriminatory effect of taxing nonresidents working in that State, when New Hampshire residents were not similarly

taxed. In *Austin*, the Court observed that in examining the validity of discriminatory taxation of nonresident individuals, its prior cases have reflected

"an appropriately heightened concern for the integrity of the Privileges and Immunities Clause by erecting a standard of review *substantially more rigorous* than that applied to state tax distinctions among, say, forms of business organizations or different trades or professions . . .", 420 U.S. at 663 (emphasis supplied),

and have established "a *rule of substantial equality of treatment* for the citizens of the taxing State and nonresident taxpayers." *Id.* at 665 (emphasis supplied).

Turning from these generalities to the case at hand, *first*, there can be no question that Section 631(b)(6) was enacted for one reason and one reason only: To generate revenue at the expense of nonresident individuals by denying them any tax deduction for alimony payments, a deduction which is allowed without limit to New York residents. Obviously, this statute is a "general rule, operating to the disadvantage of all non-residents" who pay alimony. *Travis*, 252 U.S. at 81. Indeed, the situation here is as it was in *Ward v. Maryland*, in which this Court observed that

"Imposed as the exaction is upon persons not permanent residents in the State, it is not possible to deny that the tax is discriminating with any hope that the proposition could be sustained by the court." 79 U.S. at 429.

Once such discrimination is demonstrated, under established precedents there must be shown to be a " 'substantial reason for the discrimination [against nonresidents] beyond the mere fact that they are citizens of other States.' " Such a reason would not exist "unless there is something to indicate that non-citizens constitute as particular source of the evil at which the [discriminatory] statute is aimed". Put differently, there must be a " 'reasonable relationship between the danger

represented by non-citizens, as a class, and the . . . discrimination practiced upon them.' " *Hicklin v. Orbeck*, 437 U.S. 518, 525-526 (1978) (quoting *Toomer v. Witsell*, 334 U.S. at 396, 399).

To demonstrate that such a substantial reason exists, "something more is required than bald assertion . . . ." *Mullaney v. Anderson*, 342 U.S. 415, 418 (1952). As is demonstrated in Part B. below, here there is neither any evil, nor danger, nor legitimate reason whatsoever for the blatant discrimination practiced by this statute of the State of New York against non-residents. See *Wood v. Department of Revenue*, 305 Or. 23, 749 P.2d 1169 (1988) (holding that Oregon's denial to non-residents of a deduction for alimony paid while residents were allowed to take such a deduction in computing their state income tax liability violated the Privileges and Immunities Clause); *Spencer v. South Carolina Tax Commission*, 281 S.C. 492, 316 S.E.2d 386 (1984), *aff'd by an equally divided court*, 471 U.S. 82 (1985) (holding that denial to nonresidents employed in South Carolina of nonbusiness deductions allowed for South Carolina residents in computing their South Carolina State income taxes violated the Privileges and Immunities Clause).

**B. No Substantial Reason Exists For The Discrimination Against Nonresidents As A Class Practiced By Section 631(b)(6)**

The New York Court of Appeals principally sought to rest its justification of the discrimination practiced against non-residents by Section 631(b)(6) on two alleged "reasons." The first of these was said to be that residents are taxed by New York on their entire income (no matter where earned) while nonresidents are taxed only on their income earned in New York. 89 N.Y.2d at 290, 675 N.E.2d at 821, 653 N.Y.S.2d at 67; App. 8a. However, it is evident that the distinction thus put forward has no relation to the discrimination practiced by Section 631(b)(6). This statute is purely discriminatory,

against all nonresident payers of alimony, and makes no distinction in the operation of this discrimination between those nonresidents who have only New York source income and those who have at least some income from other geographic sources.

Indeed, this same "reason" was put forward in *Travis* and rejected there by the Court, which stated that discrimination against nonresidents cannot be upheld

"upon the theory that non-residents have untaxed income derived from sources in their home States or elsewhere outside of the State of New York . . . . The discrimination is not conditioned upon the existence of such untaxed income; and it would be rash to assume that non-residents taxable in New York under this law, as a class, are receiving additional income from outside sources equivalent to the amount of the exemptions that are accorded to citizens of New York and denied to them." 252 U.S. at 81.

The second "reason" put forward below and said to justify the discrimination practiced by Section 631(b)(6) was that "petitioner's alimony payments are . . . wholly linked to personal activities outside the State [of New York]." 89 N.Y.2d at 291, 675 N.E.2d at 821, 653 N.Y.S.2d at 67; App. 8a. About this "reason," as a prefatory matter one may observe that the facts in the record do not support this conclusion. More fundamentally, it may be observed, again, that Section 631(b)(6) does not condition its denial to all nonresidents of a deduction for alimony paid in reference to any "personal activities" outside of New York, no matter to what those activities are—or are not—"linked." Rather, Section 631(b)(6) denies a deduction on the basis of one factor only: nonresidence. This statute makes no distinction in its application between nonresidents who were married and divorced in New York or whose sole source of personal income is in New York and other nonresidents who were married or divorced else-

where or whose personal income was generated from more than one State.

In any event, it is quite incorrect to say that the obligation of petitioner Christopher H. Lunding to pay alimony in 1990 was "wholly linked" to his activities outside New York. There is nothing about the obligation to pay alimony which is uniquely related to one's State of residence. *See generally*, Walter Hellerstein, *Some Reflections on the State Taxation of a Nonresident's Personal Income*, 72 Mich. L. Rev. 1309, 1348-1349 (1974). Rather, in this case (as is commonplace) the obligation to pay alimony is mandated by a final judgment of a State court of competent jurisdiction (reproduced in full in the Record on Appeal in the New York Court of Appeals below at R. 40-R. 41) which is entitled to full faith and credit (U.S. Const. art. IV, § 1), and thus is enforceable in New York and in every other State of the United States without regard to where Petitioners reside. *Cf. Shaffer v. Carter*, 252 U.S. 37, 55-57 (1920), in which it was stated that the State of Oklahoma was not constitutionally required to allow a nonresident owner of Oklahoma oil and gas leases and oil producing property to take a deduction against his Oklahoma investment income for business losses incurred elsewhere (no such losses in any event having been shown in the record of that case to have been sustained), the question of whether or not Oklahoma constitutionally must allow a deduction against such Oklahoma investment income for an allocated portion of the value of management services rendered elsewhere (but apparently not specifically tied to a particular geographic location) expressly being reserved for future consideration.

Finally, the New York Court of Appeals sought to distinguish *Travis* and *Shaffer* by stating "nonresidents are not denied [in computing their New York personal income tax] all benefit of the alimony deduction . . . ." 89 N.Y.2d at 291, 675 N.E.2d at 821, 653 N.Y.S.2d at 67, App. 8a. This statement is misconceived in reference to nonresidents as a class.

The New York system for determining the personal income tax liability of nonresidents is complex and (in its tax rates) progressive. First, "New York takes into account both New York and non-New York source income in calculating the tax rate to be applied to the New York income." *Brady v. State of New York*, 80 N.Y.2d 596, 600, 607 N.E.2d 1060, 1061, 592 N.Y.S.2d 955, 956, *cert. denied*, 509 U.S. 905 (1992). Then, the nonresident's New York personal income tax liability is computed "as if a resident." As was correctly explained below

"The hypothetical 'as if a resident' tax liability includes all deductions available to a resident, including a deduction for alimony payments. However, the numerator of the fraction (referred to as the 'apportionment percentage')—the nonresident's New York source income—is not reduced by any nonbusiness deductions (including alimony payments). The denominator—the nonresident's Federal adjusted gross income—has under the Internal Revenue Code been reduced by any alimony payments (26 U.S.C. § 215)." 89 N.Y.2d at 287, 675 N.E.2d at 819, 653 N.Y.S.2d at 65, App. 4a.

As the final step, a nonresident taxpayer's actual New York personal income tax liability is determined by multiplying his or her "as if a resident" tax liability by this "apportionment percentage." It is incorrect to state that the result of these calculations ineluctably provides a benefit to nonresidents of New York who pay alimony. A simple hypothetical example will demonstrate this. Assume a nonresident whose sole source of personal income is annual wages of \$100,000, all earned in New York; assume further that this person pays alimony of \$20,000 in a given year and has no other deductions. On these facts, the numerator for calculating the New York "apportionment percentage" would be \$100,000 and the denominator \$80,000 (because for federal purposes alimony is an adjustment which reduces taxable income while, for New York purposes, for nonresidents it is not), which results in a New York "apportionment percentage"—and thus a New

York personal income tax liability for this hypothetical non-resident—of 100/80, or 125%, of what a New York resident with the same income and alimony obligation would be required to pay.<sup>2</sup>

In short, there is no "reason" or rationale for Section 631(b)(6) except the obvious one: a desire to take the easy path of increasing revenue by imposing discriminatory taxes on nonresidents, who cannot vote in New York and thus have no voice in its legislative processes. If the decision of the New York Court of Appeals here is allowed to stand, States may take encouragement in denying to nonresident wage earners all deductions extended to resident taxpayers, resulting in a serious erosion of the principles of federalism and freedom of employment which the Privileges and Immunities Clause is intended to protect. This plainly is unconstitutional, and the judgment below of the Court of Appeals of New York should be reversed.

<sup>2</sup> The exact financial impact of this discrimination on any particular nonresident taxpayer of course varies according to the portion of that taxpayer's total income which is New York sourced and the relationship of the amount of alimony paid to that total income. However, the result always will discriminate against nonresidents by increasing their New York State personal income tax liability above that which it would have been absent the existence of Section 631(b)(6), as obviously was the case here.

## CONCLUSION

For the foregoing reasons, the judgment below of the Court of Appeals of New York should be reversed, and Section 631(b)(6) of the New York Tax Law declared to be unconstitutional and in conflict with the Privileges and Immunities Clause (Article IV, Section 2) of the Constitution of the United States.

Dated: July 2, 1997

Respectfully submitted,

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